



GRIC

Foundations for Prosecution Conference

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MOTION PRACTICE: RESPONDING TO DEFENSE MOTIONS

Presented by:

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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
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EXECUTIVE DIRECTOR


Motions Practice: Responding to Defense Motions

How to fight back!

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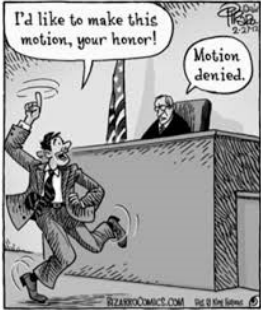
Who am I?

- Lindsay St. John
- Assistant Attorney General
- Prosecutor for 14 years
- Fraud, public corruption, violent offenses, vehicular offenses
- Lindsay.St.John@azag.gov



2

Pre-trial Defense Motions



3

Pre-trial Defense Motions: Generally

- Read the motion through
 - React/breathe/rant
 - Focus

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For the following reasons, all pending motions to stay are hereby DENIED. As an initial matter:

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It has also not escaped the Court's attention that:

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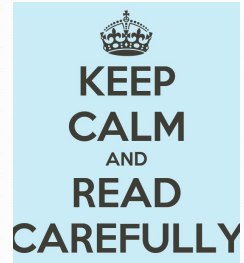
Pre-trial Defense Motions: Generally

- When is the response due?
 - 10 days from date of service- GRIC R. Crim. Proc., Rule 16.1(b)
 - Put this in your calendar!
 - File motion to extend time to respond if necessary
 - Contact defense counsel to see if they will agree

6

Pre-trial Defense Motions: Generally

- Read it through again
 - Number issues raised
 - Note facts you disagree with
 - Are there meritorious points raised?
 - Does it miss the point entirely?



7

Pre-trial Defense Motions: Generally

- YOU dictate the shape and direction of your response
 1. Go beyond the defense motion
 - Is there *relevant* case law cited?
 - What other law is applicable?
 - Is this an accurate representation of current law?
 - Is law misconstrued?
 - Are other statutes relevant?
 - What other facts should be included?

8

Pre-trial Defense Motions: Generally

- YOU dictate the shape and direction of your response
 2. Are there concessions you need to make?
 - Are there facts that harm your case/position?
 - Are some areas of law against your position?
 - Why shouldn't they carry the day?

9

Pre-trial Defense Motions: Generally

- YOU dictate the shape and direction of your response
 - 3. Create a framework to respond
 - Don't need to adopt defendant's order or format
 - Choose strategically
 - Issue order
 - How to word/frame the issue
 - Where to place concessions

10

Pre-trial Defense Motions: Generally

- YOU dictate the shape and direction of your response
 - 4. Remedy
 - Is any remedy justified/needed?
 - Is defendant's proposal reasonable?
 - Is there a less serious sanction?
 - Does the judge have discretion?

11

Pre-trial Defense Motions: Generally

- YOU dictate the shape and direction of your response
 - Outline the facts
 - Again *strategically*
 - Tell a compelling story
 - You choose the logical order
 - Focus on the relevant facts *to this motion*, not everything
 - Remember that you are laying the ground work for how the judge perceives this case
 - At the hearing
 - But potentially also at trial
 - It's ok to incorporate facts from prior motions, but highlight what the judge needs to know for *this* case

12

Pre-trial Defense Motions: Generally

- YOU dictate the shape and direction of your response
 - Highlight applicable law
 - Apply the law to your case
 - Acknowledge unfavorable law
 - E.R. 3:3 Candor to the Tribunal provides that a lawyer shall not "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel"
 - Remedy
 - Conclusion

13


Specific Types of Motions

14

Motions for Disclosure

- Rule 15.2 governs prosecutorial disclosure
- Is the material in the State's possession/control?
 - The prosecutor's obligation under this rule extends to material and information **in the possession or control of members of the prosecutor's staff** and of **any other persons** who have participated in the investigation or evaluation of the case and who are **under the prosecutor's control**.

-Rule 15.2(f), GRIC Rules of Crim. Pro.



15

Motions for Disclosure

- If not in the State's possession, defendant may be entitled to obtain it through court order:
 - Upon motion of the defendant showing that the defendant has **substantial need** in preparation of the defendant's case or material or information not otherwise covered by this rule, and that the **defendant is unable without undue hardship to obtain the substantial equivalent** by other means, a judge in the **judge's discretion** may order any person to make it available to the defendant...
 - Rule 15.2(g), GRIC Rules of Crim. Pro.
- State may want to obtain for defendant
- State may say I have no dog in this fight
- Or, State may want to address these elements in response
 - E.g. if possessed by hospital, victim, etc.

16

Motions for Disclosure

- If yes, material in the State's possession → Is defendant entitled to the material?
 - If yes, should defendant have unlimited access?
 - If yes, give it to them
 - If no, consider:
 - Redaction
 - Protective Order limiting dissemination

17

Sample Protective Order

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IN THE SUPERIOR COURT OF THE STATE OF MICHIGAN
IN AND FOR THE COUNTY OF LANSING
STATE OF MICHIGAN, by and through the undersigned Attorney General, Plaintiff,
vs.
XXXXXX, Defendant.

The State of Michigan, by and through the undersigned Attorney General, Plaintiff, requests that this Court, in its discretion, enter a protective order to prevent the Defendant from disclosing, disseminating, or otherwise making available to any third party, any information, documents, or materials that are confidential, proprietary, or otherwise protected by law, and that are in the possession, custody, or control of the Defendant.

WHEREFORE, the Plaintiff requests that this Court enter a protective order to prevent the Defendant from disclosing, disseminating, or otherwise making available to any third party, any information, documents, or materials that are confidential, proprietary, or otherwise protected by law, and that are in the possession, custody, or control of the Defendant.

Respectfully Submitted, this ____ day of January, 2016.

MARK BENOYCH
Attorney General
LINDSEY ST. JOHN
Assistant Attorney General

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Motions for Disclosure

- If yes, material in the State's possession → Is defendant entitled to the material?
 - If yes, should defendant have unlimited access?
 - If yes, give it to them
 - If no, consider:
 - Redaction
 - Order limiting dissemination
 - *In Camera* review

19

Motions for Disclosure

- If no, defendant is not entitled to the material, why not?
 - Is it relevant?
 - Is it cumulative?
 - Are there other laws protecting the material?
 - E.g. privilege (see Art. V, Rules of Evidence)
 - HIPPA
 - Protected source (e.g. law enforcement database)

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Example

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Sample Defense Motion

1 One M. Cooper, Bar No. 100000
2 COOPER & CO., P.C.
3 One M. Cooper, Bar No. 100000
4 COOPER & CO., P.C.
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

13 THE STATE OF ARIZONA,
14 Plaintiff,
15 vs.
16 MICHELLE BELFORD LOPEZ,
17 Defendant.

18 Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), Michelle Lopez moves this
19 court to order that the State disclose information in this case which contains potentially
20 exculpatory information or, in the alternative, allow counsel to subpoena the relevant

21 money from her employer, Miller's Nurseries. The State claims that Ms. Lopez, a
22 bookkeeper at the company, wrote home checks to herself and her co-defendant,
23 Christopher Lopez, without authorization. The checks, the State alleges, took place over a
24 three-year period and totaled to the company more than \$100,000. Ms. Lopez claims that
25 not only did she have authorization to write the checks but the checks were never taken
26 and were processed through the company's accounts. The company owner and
27 accountant signed multiple documents during the three-year period indicating their

- Defense counsel asks for disclosure and I say I don't have the material and that he doesn't need it
- Defense files 3 page motion to compel
- Alleges D is entitled to disclosure under *Brady v. Maryland*
 - Because the information is "potentially exculpatory"

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Sample Defense Motion

16 The State has indicated it will not provide the items and claims they are not *Brady*
17 material. Undersigned counsel has hired a forensic accountant, Christopher Linscott, to
18 review the accounting in this case. Mr. Linscott has indicated that the items discussed
19 above do have clear exculpatory value and will play a large role in his assessment of the
20

- Motion acknowledges that the State "claims" the items are not *Brady*
 - Doesn't acknowledge why
- Buuuut goes on to simply assert that items "have clear exculpatory value"

23

Sample Response

- What issues are we seeing?
 - Does State possess the material?
 - Do we want/need to hand material over?
 - Defense claims requested material is "*Brady*"
 - What is *Brady* standard?
 - In State's possession
 - Is material clearly exculpatory
 - Is there other relevant law?
 - Are there other grounds defendant might use to claim she is entitled to this material?
 - Are there relevant facts that could affect how court rules?
 - Are there other remedies short of disclosure?
 - In what order do we want to address issues?

24

Sample Response

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 IN AND FOR THE COUNTY OF PIMA

THE STATE REQUESTS THIS COURT DENY DEFENDANT'S DISCOVERY MOTION FIRST PURSUANT TO BRADY v. ARIZONA, 373 U.S. 83 (1963), BECAUSE THE EVIDENCE IS NOT MATERIAL, EXCULPATORY, OR IN THE STATE'S POSSESSION, AND DEFENDANT HAS NOT OTHERWISE MADE A PROVERBIAL NEED FOR THE EVIDENCE BECAUSE IT IS IRRELEVANT. DEFENDANT IS MERELY ENGAGING IN A FISHING EXPEDITION, WHICH SHOULD NOT BE SANCTIONED BY THIS COURT. FOR THE REASONS SET FORTH IN THE FOLLOWING MEMORANDUM OF POINTS AND AUTHORITIES, DEFENDANT'S MOTION SHOULD BE DENIED.

State's possession, and Defendant has no intention to prove a material need for the evidence because it is irrelevant. Defendant is merely engaging in a fishing expedition, which should not be sanctioned by this Court. For the reasons set forth in the following memorandum of points and authorities, Defendant's motion should be denied.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

Miller's laptop is local driving and equipment were created by Don Stinson through his corporation Stinson Enterprises, Inc. Don is his wife, his Stinson has been active with his

- Response
 - 13 pages in length
 - 3 pages of facts
 - 10 pages of law
- Immediately breaks down why defendant's request is not *Brady*
- Includes other bases for denying motion

25

Sample Response

THE REQUESTED MATERIALS ARE NOT IN THE STATE'S POSSESSION.

Defendant is requesting the items, all equipment items between the victim company and its outside accounts, and the account's billing records to the company. None of these materials are in the possession of the State, including the investigating law enforcement agency. For this reason, Defendant's motion should be denied under Rule 15.1(b) of the rules of criminal procedure.

Arizona Rule of Criminal Procedure 15.1 defines the State's disclosure requirements. But it only requires disclosure of items "within the prosecutor's possession or control," meaning "material and information in the possession or control of (1) the prosecutor, or members of the prosecutor's staff, or (2) any law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control, or (3) any other person who has participated in the investigation or evaluation of the case and who is under the prosecutor's direction or control." *Id.* at 15.1(b). Similarly, the State's obligation under *Brady* only applies to evidence in the State's control. *Quinn v. State*, 271 U.S. 240, 241 (1986). Undoubtedly, a cooperative witness is not an agent or representative of the State. *State v. Krell*, 111 Ariz. 246, 247, 827 P.2d 241, 242 (1992). *State v. Krell*, 111 Ariz. 246, 247, 827 P.2d 241, 242 (1992).

In this case, Defendant has requested law items, an engagement letter between the victim company and its outside accounts, and that account's billing records to the company. As the State advised Defendant in a letter dated October 6, 2016, none of these items are in the State's possession. Therefore, Defendant's motion should be denied under Rule 15.1(b) and (c).

- Start with fundamental issue for any disclosure motion:
The materials are not in State's possession
- Explain the law about possession
- Explain that this applies to *Brady* motion, too
- This could be the end of the motion, but better to shut down all bases of request

26

Sample Response

DEFENDANT IS NOT ENTITLED TO THE REQUESTED DOCUMENTS.

Defendant has provided no legal authority for her claims that she is entitled to disclosure of the requested documents or that the State should be ordered to provide her the documents even though they are not within the State's possession and control. Defendant has not shown that the documents are exculpatory, nor has she shown a substantial need for the materials. For these reasons, her motion should be denied.

A. The requested items are not exculpatory.

The Due Process Clause of the United States Constitution requires the State to disclose only exculpatory evidence that is material to the issue of guilt or punishment. *Brady v. Arizona*, 373 U.S. 83, 100 (1963). The United States Supreme Court has held that a defendant is denied a fair trial only if there is a reasonable probability that, had the exculpatory evidence been disclosed, the result of the proceeding would have been different. *Id.* at 100 (quoting *United States v. Agurs*, 427 U.S. 97, 102 (1974)).

Defendant is requesting an engagement letter and billing information to documents whether he had put in the time to become "familiar with the company's cash flow including bonus checks." This inquiry is entirely irrelevant to a criminal case, where the issue is not appointment

- Even if not in the State's possession, defendant isn't entitled to material
- Because it isn't exculpatory
 - Not relevant
 - Cumulative of other evidence already disclosed

27

Sample Response

B. Defendant has not shown any substantial need for the documents requested.

Although the State is not usually responsible for producing items outside its possession or control, the Court has the authority to order anyone to provide material to Defendant if the law makes a showing of substantial need. Rule 15.2(g) of the Arizona Rules of Criminal Procedure sets forth the circumstances under which a court may, in its discretion, order disclosure of items outside the State's possession and control. Defendant has not made the requisite showing under the rule and therefore is not entitled to disclosure.

Usually, "[t]he prosecution is under no obligation to turn over materials not under its control." *Chavez v. Dominguez-Pilo*, 954 P.2d 561, 568 (9th Cir. 1992) citing *Chavez v. Martinez*, 941 F.2d 761, 764 (9th Cir. 1992); *State v. Adame-Gonzalez*, 145 Ariz. 441, 446, 702 P.2d 670, 679 (1985). Furthermore, "[t]he [S]tate cannot be held to disclose material that it does not possess." *State v. Armstrong*, 208 Ariz. 340, 356-57, 93 P.3d 1061, 1072-73 (en banc), 208 Ariz. 340, 93 P.3d 1076 (2000) (citing *State v. McDowell*, 139 Ariz. 185, 195, 685 P.2d 70, 77 (1983)). However, Rule 15.2(g) provides that the court may order any person to make materials available to a defendant upon a showing that the defendant "has substantial need in the preparation of his case and that the defendant is unable without undue hardship to obtain the substantial equivalent." *Ariz. R. Crim. P. 15.2(g)* (emphasis added). The State is obligated to disclose material not in its possession or control only when "(1) the state has better access to the information; (2) the defense shows that it has made a good faith effort to obtain the information without success; and (3) the information has been specifically requested by the defendant." *State v. Smith*, 132 Ariz. 213, 219, 299 P.2d 187, 191 (1975).

- Address Rule 15.2(g)
 - Defendant doesn't have substantial need
 - Defendant already has substantial equivalent
 - Judge should not use discretion to order disclosure

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Sample Response

Defendant cites Carpenter v. Superior Court in and/or the County of Maricopa, 174 Ariz. 446, 852 P.2d 248 (1993), for the proposition that Defendant should be allowed to subpoena the requested documents directly from a third party. In *Carpenter*, the Arizona Court of Appeals considered whether a defendant could issue a subpoena *duces tecum* to the police department to obtain police reports from other cases involving the defendant, rather than requesting those reports from the State pursuant to Rule 15.1. The court noted that Rule 15.1(g) "was enacted to recognize the possibility that in exceptional cases, such as those in which a private party or governmental agency not subject to the prosecutor's control possesses evidence material to the case, additional materials may exist that should be discoverable by the defendant." *Id.* at 450. The court went on to rule that the defendant could not issue a subpoena directly to the 3rd party agency, but had to request the material pursuant to Rule 15.1. *Carpenter* reaffirms that Defendant

- Address defendant's (slim) case law
 - Provide additional information about the case
 - Additional facts or quotes
 - Is this still good law?
 - Distinguish facts

29

Sample Response

C. Defendant's request is merely a fishing expedition.

The Arizona Supreme Court has ruled that any request for disclosure must be reasonable, thus even "fishing expeditions" are not contemplated." *State v. Krell*, 111 Ariz. 240, 242, 527 P.2d 231, 237 (1974) *see also State v. Angel*, 118 Ariz. 106, 109, 574 P.2d 1325, 1328 (App. 1978) (events of judicial discretion distinguished by reasonableness of request since even fishing expeditions are disclosed). If it appears that the defendant is on a "fishing expedition" to see what might turn up, the request for disclosure should be denied. *State v. Peltier*, 87 Ariz. 284, 300, 308 P.2d 808, 812 (1965). Indeed, "[w]here there is no evidence, beyond defense assertions, insinuations, and speculations," that the material "would aid the defendant, it is not as abuse of discretion for the court to refuse to order the requested disclosure." *State v. Poyer*, 113 Ariz. 360, 362, 553 P.2d 656, 658 (1978).

The Defendant has failed to demonstrate that the documents she is requesting are material to her defense. She already has the ledger in which she listed some of the questioned checks as "Norton," she has the prior interview of the accountant and will have the opportunity to interview her again. The documents which in past interviews the Defendant herself provided but also include other private information not relevant to the preparation of Defendant's defense. She has not articulated more than an abstract need founded in speculation and unsupported assertions. Defendant's request is nothing more than a fishing expedition which should not be countenanced by this Court.

- Additional law
 - The law disfavors "fishing expeditions"
 - Defendant's motion fails to articulate specifically how each requested item would be important

30

Sample Response

CONCLUSION:

Defendant has been provided with all material in the State's possession. She is now requesting additional documents that are outside the State's position and control, but fails to provide this Court with any legal authority for why she is entitled to the materials. As discussed above, Defendant has failed to articulate specifically where in the request she asserts she

If this Court is considering entering the victim's business, State Enterprises, to disclose the requested materials, the State respectfully requests that the victim's counsel be allowed to respond directly. The victim, while essential to the case, is not a party and therefore has not yet had a right of response on this issue. The State further requests that any disclosure be made to the Court directly for in camera review to reduce dissemination of sensitive financial information and determine what if anything should be disclosed to the defense.

If response to this issue, the State further requests that any disclosure be made to the Court directly for in camera review to reduce dissemination of sensitive financial information and determine what if anything should be disclosed to the defense.

- Conclusion restating argument
- And addressing remedy:
 - Asking for victim's right to respond (as 3rd party holder of requested material)
 - And proposing in camera review

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Motions for Disclosure: Summary

- If you have it, it should be disclosed absent good reason
- If you don't have it, think about whether you should obtain it for defense
- If after all this thinking, you believe defense is not entitled to the material- DIG IN!

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Motions to Suppress Evidence

- Usually fall into two categories:
 1. Evidence was not legally/fairly collected
 2. Evidence cannot fairly be introduced
- Figure out which category you fall in
 - Once part of the issue is raised, you must address the whole thing
 - E.g. Motion to Suppress claiming unlawful search of vehicle
 - You must prove every element of the stop was lawful
 - And build the base of probable cause

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Motions to Suppress Evidence

- Claim: Evidence was not lawfully collected- Typical motions
 - Unlawful search or seizure
 - Involuntary statement (D's will overborne)
 - *Miranda* violation (in custody, question designed to elicit incriminating information)
 - These are two SEPARATE issues- related but not the same
 - Identification unfair
 - Always remember to look at State action
 - Was procedure *unduly* suggestive
 - Chain of custody defect
 - This is an easy one: generally chain of custody defects go to weight not admissibility of the item. *State v. Gonzales*, 181 Ariz. 502 (1995)

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Motions to Suppress Evidence

- Claim: Evidence was not lawfully collected
- Considerations for response:
 - Is defense mistaken about law making the collection legal?
 - Is defense mistaken about facts justifying collection?
 - Does defendant have standing to assert unlawful collection?
 - Was there another way that the evidence could/would have been obtained?

35

Motions to Suppress Evidence

- Claim: Evidence cannot fairly be admitted
 1. Is evidence relevant?
 - Cite Rule 401, Rules of Evidence
 - Explain why/how
 - Does it go to motive, opportunity, intent, identity, absence of mistake, etc.
 - Rule 404(B), GRIC R. of Evid. (Rebecca's presentation!)
 - Is it evidence of an uncharged conspiracy?
 - Would make other conspirators actions and statements admissible (we'll discuss in a moment)
 - Does it come together with other pieces that are not immediately apparent?

36

Motions to Suppress Evidence

- Claim: Evidence cannot fairly be admitted
 - 2. Is evidence prejudicial?
 - Does prejudicial effect **substantially** outweigh probative value? (Rule 403 analysis)
 - Don't forget this is not an even balancing test, the rules favor admission
 - Relevant evidence is frequently necessarily prejudicial

37

Motions to Suppress Evidence

- Claim: Evidence cannot fairly be admitted
 - 3. Is there a legal standard for admission?
 - E.g. Search and Seizure law
 - *Dessureault* hearings
 - Voluntariness/*Miranda* law
 - Is there a good faith exception?
 - Is mistake of fact allowed? (e.g. in determining reasonable suspicion)

38

Motions to Suppress Evidence

- Claim: Evidence cannot fairly be admitted
 - 4. Are defendant's rights violated by the admission?
 - Confrontation clause?
 - *Bruton* problems with a testifying co-defendant? (we'll discuss with motions to sever)
 - Claims of hearsay
 - Non-hearsay (not for the truth of the matter- Rule 801(C)(2), GRIC R. Evid.)
 - Opposing party statement (Rule 801(D)(2), GRIC R. Evid.)
 - Co-conspirator statement (R 801(D)(2)(e))
 - Conspiracy doesn't have to be charged!
 - Other exceptions- e.g. excited utterance, business records, public records, prior convictions (Rule 803, GRIC R. Evid.)
 - Residual exception- hallmarks of credibility, best evidence of a material fact (Rule 807, GRIC R. Evid.)

39

Motions to Suppress Evidence

- Claim: Evidence cannot fairly be admitted
 - 4. Are defendant's rights violated by the admission?
 - Other due process concerns?
 - Inability to examine/re-test
 - Insufficient Scientific basis for evidence
 - Court to act as gatekeeper to determine admissibility of evidence, to consider:
 1. Would expert's knowledge would help jury
 2. Based on sufficient data
 3. Product of reliable principles and methods (the most common fight)
 4. Principles and methods reliably applied
 - You need to address all of these bases
 - Helpful to talk to your expert about their process and what/how to question them

40

Motions to Suppress Evidence

- What is the appropriate remedy?
 - First identify harm
 - Would remedy to repair harm or is it for punishment?
 - Limited areas of law in which punishment is justification
 - Is a remedy needed at all?
 - What is the least harmful remedy?
 - Lay out judicial options
 1. Re-do (e.g. re-indict, allow additional testing/interviews)
 2. Curative instruction (e.g. *Willits* instruction)
 3. Suppression
 4. Dismissal (with or without prejudice)
 - Explain why your proposal is best
 - How does it affect interests of justice?
 - Interests of victim?

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Motion to Suppress: Example

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Example

- Defense Motion moves to suppress “all items” (specifically the gun) found inside Defendant’s car during traffic stop, claiming
 - Violation of the US Constitution 4th (search and seizure) and 14th (due process) Amendments
 - Allege unlawful search and seizure
 - Officer lacked reasonable suspicion for stop based on window tint
 - And Officer was mistaken about law which controls the amount of visible light that must pass through window *not* the amount of UV light
 - Facts alleged:
 - Officer stopped D for “unusually dark tint”
 - D “could not” provide identification
 - Car impounded a searched



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Example

- Response:
 - Facts:
 - Go through reasonable suspicion for stop
 - When officer caught sight of car
 - Why he thought tint was too dark
 - How later that tint was measured and found too dark
 - Basis for removing D from car and impounding
 - Include detail about D providing false name
 - That name did not have driver’s license
 - D ticketed and not allowed to drive away because car being impounded
 - Inventory search pursuant to impound



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Example

- Response:
 - Law:
 - Explain reasonable suspicion
 - A “particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing” based on totality of circumstances. *U.S. v. Cortez*, 449 U.S. 411 (1981)
 - Explain totality of circumstances in this case
 - Observations made by officer (direction of travel, ability to see inside the car, lighting)
 - Learn law on window tinting → Explain law on window tinting
 - And officer’s training on law
 - Explain why D wasn’t allowed to drive car away
 - And why logically the car must have inventory search before impound
 - Remedy
 - No remedy necessary, as no violation
 - And no bad behavior to deter



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Example: Result

- D filed amended motion alleging that stop was pretextual based on self-serving statement of his co-defendant
 - Response: pre-textual stops are allowed if officer had reasonable suspicion
- → Motion denied
- Motion to stay proceedings for special action
 - Response: this is not the basis of a special action, issue can be preserved for appeal
- → Motion denied
- Motion for change of judge for cause
 - Filed, then withdrawn
- → Motion denied

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Motions to Sever: Generally

- Whenever two or more offenses or two or more defendants have been joined for trial, and severance of any or all offenses, or of any or all defendants, or both, is **necessary to promote a fair determination of the guilt or innocence** of any defendant of any offense, the court may on its own initiative, and shall on motion of a party, order such severance.

-Rule 2.4(a), GRIC R. Crim. Proc.

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Motions to Sever: Counts

- The defendant shall be entitled **as of right to sever offenses** joined only by virtue of Rule 2.3(a)(1) [of similar character], unless evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately.

-Rule 2.4(b), GRIC R. Crim. Proc.

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Motions to Sever: Counts

- Responding
 - Set the scene for interconnectedness with your facts
 - Is there another reason the counts are joined (not just similar character)?
 - E.g. timing
 - Same victim/area
 - Necessary element to have multiple offenses (e.g. ID theft)
 - Would evidence be admissible regardless of severance?
 - E.g. ID- What D wore/stole/said/etc. at one scene, helps ID him at the next
 - D's conduct informed the course of the investigation in a way that only makes sense if you talk about both offenses
 - Remedies
 - Is bifurcation possible?
 - E.g. prohibited possessor, DUIs

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Motions to Sever: Defendants

- "Prejudice occurs when (1) evidence admitted against one defendant is **facially incriminating** to the other defendant, (2) evidence admitted against one defendant has a **harmful rub-off effect** on the other defendant, (3) there is **significant disparity in the amount** of evidence introduced against the defendants, or (4) co-defendants present **antagonistic, mutually exclusive defenses** or a defense that is harmful to the co-defendant."

-*State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995) citing *State v. Grannis*, 183 Ariz. 52 (1995)

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Motions to Sever: Defendants

- "Evidence admitted against one defendant is facially incriminating against another"
- i.e. evidence that would not otherwise be admissible
- Special Note: *Bruton* issues
 - *Bruton v. U.S.*, 391 U.S. 123 (1968): A defendant's Sixth Amendment confrontation right requires defendant's trials to be severed if the State is introducing a non-testifying codefendant's statement that directly incriminates the moving defendant.
 - Can instead be presented as an evidence suppression issue
 - State has to choose between introduction of evidence and joinder of co-defendants
 - Is statement really incriminating of co-defendant?
 - Remedy: Are you willing to forgo parts of statement?
 - At least until co-defendant testifies (which can trigger antagonistic defenses)

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Motions to Sever: Defendants

- Responding:
 - Identify basis of motion
 - Push defense to identify which basis they are claiming
 - Not just "unfair" to try together
 - Demand articulation of defenses to analyze whether they are antagonistic, not inherently prejudicial
 - Address all relevant *Grannis* factors
 - Argue impact on judicial economy
 - Overlapping testimony/evidence
 - Speedier resolution of multiple cases
 - Remedies
 - Willing to forgo some evidence?
 - Would jury instruction cure harm?
 - If unsure, err on the side of severance
 - Mid-trial severance is the worst e.g. when defenses suddenly become clear

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Example: Motion to Sever Defendants

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Example:

- Defendant Sarah calls her ex-boyfriend to invite him over to her house. She also calls and texts mutual friends to locate him.
 - Once he comes over, Sarah's new boyfriend, Scott, beats the ex-boyfriend to unconsciousness.
 - They load him into the trunk of a car which they drive away and abandon. The victim dies of asphyxiation.
 - Defendants are set to be tried together.
- Scott's attorney files motion to sever. He doesn't want Sarah's texts introduced against him. He wants to argue that the victim died as a result of mutual combat injuries. He argues there is more evidence and witnesses against Sarah.
- How to respond??

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Example response:

- Reframe facts to show more equal responsibility
 - Talk about witnesses in common against both co-defendants
- Basic joinder law
- *Grannis* factors:
 1. No facially incriminating evidence that would only be admissible against Sarah
 - No confrontation clause issue
 - Messages were non-testimonial
 - Also messages did not directly implicate Scott
 - No *Bruton* issue
 - Messages were made in furtherance of conspiracy
 - Remedy is excision of those messages, not dismissal
 2. Similar amounts of evidence
 3. No mutually exclusive defenses
 - Both defendant's claim no advance plan to kill V
 - Both defendant's acknowledge Scott did the physical damage to V
- Judicial economy!

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Motions to Dismiss

How to be a
good
defense
attorney:

- 1 Ask the court to dismiss the charge. You can bring a pretrial motion to dismiss and win the case without ever having to go to trial. There are many reasons why you can file a motion to dismiss. Be aggressive and push your advantage by raising as many reasons as credibly possible.¹¹
 - there was no probable cause for the arrest
 - the criminal complaint or other charging document is improper
 - there is insufficient evidence to prove your client guilty
 - a necessary witness is unavailable
 - necessary evidence has been lost by the prosecutor

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Motions to Dismiss

- The court, on motion of the defendant, **shall order that a prosecution be dismissed upon finding that the complaint is insufficient as a matter of law**; however, the motion should not be granted on the basis of technical defects which can be cured by amendment.
 - Rule 16.3(b), R. Crim. Proc.
- But can also be a sanction for Due Process violation
 - Only in extreme circumstances
 - E.g. "only in rare circumstances should a case be dismissed for a discovery violation"- Rule 15.7(b), GRIC R. Crim. Proc.
 - Even search and seizure violations usually result in suppression, and then you are the one choosing to dismiss
 - In most instances, the remedy for prosecutorial misconduct is a new trial, but if the conduct is extreme or taint cannot be cured, dismissal may be appropriate. See *State v. Minnit*, 203 Ariz. 431 (2002)
- So, always consider and highlight alternate remedies

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Allegations of Prosecutorial Misconduct

- Notify your supervisor
 - Talk through the allegation
 - Are you going to be the one responding and arguing?
- Is it pre-textual
 - E.g. an over statement of a disagreement about the law
 - Or a way to get around time limits
- Were mistakes made that need to be acknowledged?
 - Were they intentional? If so why did you choose that conduct?
- Is there any appearance of impropriety?
 - Explain why no actual harm done or what remedial steps have been taken
- Is it groundless?
 - Point that out clearly
 - Highlight the strategic nature of the allegation (e.g. the remedy sought)
- Once you know you've done nothing wrong, don't be afraid to fight it


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For some of us, currently court looks a lot like this:



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Or this:



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But soon we'll be back to this:



"Could my client be innocent? Probably not. My point is it's interesting to think about."

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Defense Motions in Trial

- Organize your thoughts
 - Same general approach:
 - Are facts accurately stated?
 - Is law accurate?
 - Any law missing?
 - Do you need time to research?
 - Practice tip:
 - Memo to the court ahead of time
 - Come armed with statutes and case law!
 - What is appropriate remedy?
 - Take a moment to frame your message- breathe, prioritize, don't snap back
- Deliver your laser-focused argument

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Motion for Mistrial

- Clarify basis
- Ask for time to respond (make sure your record is complete)
- If legal question, ask for time to brief/memo
- If factual question, can ask judge to have court reporter read back
- Remedy
 - Is there even a problem?
 - Is it curable with you clarifying to jury? (e.g. "I misspoke...")
 - Is it curable with a jury instruction?
 - Any other solutions short of mistrial? (e.g. allow re-open, stip, or judicial notice of an issue)
- If mistrial, make sure the judge is explaining "manifest necessity" (*Arizona v. Washington*, 434 U.S. 497 (1978)) or may result in double jeopardy problem
 - And reset for 60 days unless defendant waives time (AZ R. Crim. Proc.- no equivalent deadline in GRIC R. Crim. Proc.)

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Motion for Judgment of Acquittal

- Rule 19, GRIC R. Crim. Proc.
 - Subsection (a) governs pre-verdict at the close of the State's case if "there is no substantial evidence to warrant a conviction"
 - Lay out the facts in support of each element of your charges
 - Be persuasive, but don't give away closing
 - Subsection (b) allows for re-urging within 10 days after verdict
 - You only have 5 days to respond!
 - But, should be very similar to what you already argued
 - Unlikely to have transcripts
 - So couch in terms of what you recall evidence being, and include multiple point of evidence if possible for each element

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Post-trial Motions

- Motion for new trial (Rule 23.1, GRIC R. Crim. Proc.)
 - Bases (GRIC Code 5.1526):
 - Verdict contrary to law or weight of the evidence
 - Juror misconduct (can be unintentional)
 - Judicial error on matter of law
 - Prosecutorial misconduct
 - Newly discovered (material) evidence (which would probably affect outcome)
 - Must be filed within 30 days (except newly discovered evidence can be filed for a year)
- How to respond:
 - Identify basis
 - Are facts and law complete and accurate?
 - If not, supplement
 - The judge was there- help jog his/her memory
 - Is this the appropriate remedy

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Post-trial Motions

- Motion to Vacate Sentence (Rule 23.2, GRIC R. Crim. Proc.)
 - Bases (GRIC Code 5.1525(B)):
 - Court was without jurisdiction
 - Newly discovered material facts
 - Conviction in violation of the Constitution
 - Judge may deny it outright on grounds that it has already been decided (prevents entertaining multiple motions on the same claims)
 - Otherwise up to you- same format
 - Supplement law
 - Supplement facts
 - Address remedy


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Summing it up

- No matter the motion, the procedure is always the same
 - Identify the claim
 - Identify/challenge/supplement facts
 - Write persuasively- help the judge see things from your perspective
 - Identify/challenge/supplement law
 - Call out inaccurate or incomplete law
 - Address the appropriate remedy
 - Including if no remedy is needed
 - Be proactive in selecting your response framework
- Run in by your supervisor, a trusted colleague, or run in through your brain for a few days
- You CAN give order to chaos
- You CAN be the trusted voice of authority
- You CAN define the narrative (most of the time)
- You CAN respond to and defeat motions (even if you have other things you'd rather be working on!)

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Good luck!



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Questions?

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